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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALAN BRINKER, individually and on behalf of all others similarly situated, Plaintiff, v. NORMANDIN'S, a California corporation, d/b/a NORMANDIN CHRYSLER JEEP DODGE RAM, and ONECOMMAND, Inc., Defendants.	NO. 5:14-cv-03007-EJD-HRL **DISCOVERY DISPUTE JOINT REPORT #4**

ISSUE: Whether Defendant OneCommand is required to supplement production to Request for Production No. 4.

The parties held a telephonic meeting on Monday, March 14, 2016 at 8:30 a.m. prior to attending the deposition of Plaintiff Alan Brinker at the offices of Andrew V. Stearns, BUSTAMANTE & GAGLIASSO, APC, River Park Tower, 333 W. San Carlos St., Suite 600, San Jose, California 95110. The meeting took approximately 30 minutes.

This discovery dispute bears upon Plaintiff's motion for class certification, which is due on April 8, 2016. The expert-related discovery cutoff is July 15, 2016. All other discovery ends on August 5, 2016.

Adrienne D. McEntee and Steven C. Coffaro attest that they complied with the Court's Standing Order.

I. THE DISPUTE AND ESSENTIAL FACTS

Plaintiff alleges that in March 2014, Plaintiff received a telephone call made by Defendant OneCommand on behalf of Defendant Normandin on his cellular telephone. Dkt. No. 36 at ¶ 14. The call consisted of a prerecorded message known as an "Overdue Maintenance Reminder." *Id.* at ¶ 15. On behalf of himself and those who received prerecorded messages promoting Defendant Normandin's goods and services on their cellular phones (*Id.* at ¶ 21), Plaintiff asserts claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"). The TCPA makes it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using … an artificial or prerecorded voice … to any telephone number assigned to a … cellular telephone service." *See* 47 U.S.C. § 227(b)(1)(A)(iii).

In May 2015, Plaintiff served Defendant OneCommand with Plaintiff's First Set of Requests for Production. OneCommand provided responses on June 17, 2015. This dispute concerns OneCommand's response to Request for Production No. 4:

REQUEST FOR PRODUCTION NO. 4: Please produce all DOCUMENTS, DATABASES, and ESI identifying or listing the names, addresses, telephone numbers, and email addresses of PERSONS to whom the CALLS[1] were made, including historical copies of any such DATABASE(S) or any other DOCUMENTS showing, or that can be used in reconstructing, the history of any such DATABASE from July 1, 2010 to the present.

RESPONSE: OneCommand objects to this request on the grounds that it is compound, overbroad, unlimited in scope, ambiguous, premature, and seeks disclosure of information that is not relevant to Plaintiff's motion for class certification and that is beyond the scope of the class of similarly situated individuals who received the same call that Plaintiff claims to have received. OneCommand further objects to the request for information identifying the call recipients and potential class members because such disclosure is inappropriate and premature unless and until a class is certified. Subject to said objections, OneCommand has already produced, in response to Plaintiff's subpoena, documents Bates numbered OC 000004 through OC 000129. Those documents contain the unique telephone numbers whose owners are similarly situated with Plaintiff in that they received, on or after July 1, 2010, the same call on behalf of Normandin's that Plaintiff allegedly received in March 2014.

II. PLAINTIFF'S POSITION

The parties previously submitted Discovery Dispute Joint Report #3 ("Report #3"), in which Plaintiff sought, among other things, to compel the names of 5,800 putative class members, the phone number for each putative class member, and the date and time of each call to the putative class members. On November 20, 2015, this Court ordered OneCommand to produce these facts. *See* Dkt. No. 70.

Through discovery, Plaintiff has learned that OneCommand made prerecorded calls on Normandin's behalf that contained approximately one dozen scripted messages. The scripted prerecorded messages were used as part of telemarketing campaigns, including: (1) Service

[1] Although the request can be read to include all calls made, whether to cellular telephones or residential lines, Plaintiff moves to compel only cellular telephone data, which is consistent with the proposed class described in the First Amended Complaint. Plaintiff sought leave to file a proposed Second Amended Complaint, which includes a proposed class of persons who were called on their residential lines and who were also on the National "Do Not Call" Registry. However, that motion is still pending.

Manager Welcome; (2) First, Second, and Third Year Anniversaries After Vehicle Purchase; (3) One Day, Thirty Days, and Sixty Days Prior to Lease Expiration; (4) Purchase Thank You Soliciting the Customer Care Program; (5) First Maintenance Reminder; (6) Overdue Maintenance; (7) Unassigned Retail; and (8) Service Thank You. At the time Plaintiff submitted Report #3, he believed that OneCommand had produced call data for all putative class members who had received a prerecorded message of any kind from OneCommand. In other words, Plaintiff understood the potential size of the class to be approximately 5,800 members.

It was only after Plaintiff submitted Report #3 that he learned OneCommand had provided call data relating to just the specific type of prerecorded call that Plaintiff received about Overdue Maintenance. That is, OneCommand only produced calls involving the very same script. OneCommand did not produce data related to the rest of the dozen types of prerecorded calls it made using other scripts. Plaintiff is aware of at least 72,166 calls.[2] By refusing to produce data regarding all prerecorded calls, OneCommand has unilaterally limited Plaintiff's access to necessary class-related information.

A party may obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). In applying this rule, the court considers the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* Information within this scope of discovery need not be admissible in evidence to be discoverable. *Id.* If a party fails to make disclosures or cooperate in discovery, the requesting party may move to compel. Fed. R. Civ. P. 37(a)(1). "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *DIRECTV, Inc. v.*

[2] This number comes from a report OneCommand produced to Normandin's covering the period November 2011 to October 2014.

Trone, 209 F.R.D. 455, 458 (C.D. Cal. 2002).

The TCPA prohibits making "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone[.]" 47 U.S.C. § 227(b)(1)(A)(iii)). Plaintiff seeks to certify a class comprised of *all* persons who received a prerecorded call to their cellular phones on Normandin's behalf. In furtherance of this goal, Plaintiff properly seeks production of *all* prerecorded calls that OneCommand made to cellular telephones during the class period on Normandin's behalf. This Court has already held that "production of information about how many calls OneCommand made to each putative class members and the dates on which those calls were made" are relevant and appropriate. *See* Dkt. No. 70 at 3. Because the class Plaintiff seeks to certify embraces all persons who received a prerecorded message of any kind on their cellular telephones, OneCommand should not be permitted to unilaterally limit the size of the class to just persons who received a prerecorded call about Overdue Maintenance.

OneCommand does not argue that the requested discovery is disproportionate or unduly burdensome. Instead, OneCommand asserts two irrelevant arguments, neither of which justify OneCommand's failure to produce data showing every prerecorded call OneCommand made to cellular telephones during the class period.

First, OneCommand's argument that Plaintiff's claim is not typical of the proposed class because he received only an Overdue Maintenance prerecorded message, rather than all of the dozen prerecorded messages OneCommand made to the proposed class, is without merit. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "The test of typicality is whether the other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured in the same course of conduct." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011). "The Ninth Circuit does not require the named plaintiff's injuries to be identical with those of the other class members, but only that the unnamed class members have injuries similar to those of the named plaintiff's and that the injuries result from the same injurious course of conduct." *Hanon*, 976 F.2d at 666 (question and internal marks omitted).

In the TCPA context, Courts have found typicality where a defendant's practice of making the same unsolicited contact to plaintiff and the proposed class formed the basis of the class's claim, and all class members have the same interest. *See Whitaker v. Bennett Law, PLLC*, No. 13-CV-3145-L NLS, 2014 WL 5454398 at *5 (S.D. Cal. Oct. 27, 2014) (finding typicality satisfied because each class member's claim "revolves exclusively around [the defendant's] conduct as it specifically relates to the alleged violations of the TCPA"); *see also Bridgeview Health Care Ctr., Ltd. v. Clark*, No. 14-3728, 2016 WL 1085233, at *5 (7th Cir. Mar. 21, 2016) (declining to create a subclass when every class member had the same interest: to obtain the $500–per–recipient penalty for violations of the TCPA). Here, Plaintiff's claims are premised on precisely the same conduct as the claims of the members of the proposed classes. Plaintiff and proposed class members each received prerecorded messages from Defendants, each call was made for the purpose of soliciting business,[3] and each Plaintiff has an interest in obtaining a $500-per-recipient penalty for the TCPA violations.

OneCommand's reliance on *Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-CV-03067 EJD, 2013 U.S. Dist. LEXIS 81394 (N.D. Cal. June 10, 2013) is misplaced. There, the plaintiff alleged that the defendant mislabeled several of its products. Although the plaintiff had purchased some of the product she alleged were deceptive, she did not purchase all of the products described in the complaint. Nor did she purchase all of the products for which she

[3] The report OneCommand produced to Normandin's listing 72,166 calls also describes the amount of revenue Normandin's received as the result of these calls. Contrary to OneCommand's suggestion that one or more of the dozen prerecorded calls OneCommand made to class members were informational, OneCommand's report associates each type or category of prerecorded message with specific revenue. *See Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012) (holding calls that encouraged recipients to engage in future purchasing activity constituted telemarketing regardless of the caller's intent).

sought certification on behalf of a class of similarly situated persons. As a result, this Court held that the typicality requirement had not been met where the "named plaintiff . . . purchased a different product than that purchased by unnamed plaintiffs." *Major*, p. 6. But *Major* does not apply here because, as OneCommand concedes, this case "does not involve products purchased by Plaintiff."

This case involves Defendants' uniform, unlawful conduct in making prerecorded calls to cellular telephones. At least one court has addressed typicality in the TCPA context and has rejected the very argument OneCommand makes here. In *Golan v. Veritas Entm't, LLC,* 788 F.3d 814, 821 (8th Cir. 2015), the Eighth Circuit considered whether a class representative's claim was typical of the claims of proposed class members who heard different prerecorded messages promoting the same soon-to-be-released movie. *Id.* The district court concluded that the fact the Golans heard a different prerecorded message meant they suffered a different injury than other class members, making them inadequate class representatives. *Id.* The Eighth Circuit disagreed, concluding that "[w]hat matters for all class members, including the Golans, is that each call was initiated for the purpose of promoting Last Ounce of Courage." *Id.* The Golans' claims were typical of the class because the Golans were not subject to a unique defense, and did not suffer a different injury than class members who heard a different message. *Id.*

Here, OneCommand's conduct, and the class members' injuries, were the same, whether the prerecorded calls were related to Overdue Maintenance or the Anniversary of a Purchase, because the purpose of each and every prerecorded message was to promote Normandin's products and services. Plaintiff properly represents all persons who received a prerecorded message on their cellular telephones during the class period, and is entitled to the call data related to each and every call.

Second, this Court should disregard OneCommand's suggestion that Plaintiff should be barred from seeking to compel all data regarding prerecorded messages made on cellular telephones because he did not make his request previously. Had Plaintiff's counsel known in August 2015 what they know now, Plaintiff's counsel certainly would have raised the issue.

Regardless, OneCommand has failed to assert any legal authority that would justify its refusal to supplement its production. Nor is Plaintiff aware of any.

In short, OneCommand has put forth no evidence that the requested discovery is disproportionate or unduly burdensome. Because the requested information is relevant for purposes of identifying *all* members of the proposed class, Plaintiff requests an order compelling OneCommand to supplement its production in response to Request for Production No. 4.

III. ONECOMMAND'S POSITION

At Plaintiff's request, Discovery Dispute Joint Report No. 3 was submitted to the Court on August 20, 2015 (Dkt. No. 62). There, Plaintiff argued that OneCommand should produce the names and other information about the approximately 5800 putative class members whose telephone numbers OneCommand had already produced. Plaintiff argued that this information "is relevant for purposes of identifying the members of the proposed class" (*Id.* at p. 6) and was needed to determine typicality of the proposed class. (*Id.* at p. 3). The Court agreed in part, and ordered OneCommand to provide additional information about the proposed class members. (Dkt. No. 70). One Command complied.

Now, Plaintiff seeks data about individuals who received any *other* types of calls that Plaintiff himself did not receive. The ***only*** type of call that Plaintiff received was an "Overdue Maintenance Reminder" – an informational call described in paragraph 15 of his Complaint. (Dkt. No. 36). Plaintiff's delayed request for this information is unjustified, because he is not a proper representative of a class of persons who received any types of calls that he did not receive. Moreover, his request flies in the face of both the admonition in the Court's standing orders to promptly bring discovery disputes to the Court's attention, and the requirement of Fed.R.Civ.P. 23(c)(1)(A) that the question of class certification be decided "[a]t an early practicable time after a person sues or is sued as a class representative." Plaintiff's request should be denied, for the following reasons.

First, because Plaintiff received only the cellular Overdue Maintenance Reminder call, he cannot assert a claim based upon any other types of calls made to cellular numbers on behalf of

Normandin's. Nor can he represent a class of individuals who did receive such calls. *See Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-CV-03067 EJD, 2013 U.S. Dist. LEXIS 81394 (N.D. Cal. June 10, 2013). In *Major*, the Plaintiff purchased five varieties of Ocean Spray juices and drinks that she alleged were falsely labeled. She sought to certify a class of all persons in California who purchased *any* variety or flavor of Ocean Spray products that contained false labeling or representations, including flavors that she herself did not purchase. The Court declined to certify such a class because the plaintiff could not establish the "typicality" requirement of Fed.R.Civ.P. 23(a)(3). The Court stated:

> [t]he primary reason behind the Court's determination that the typicality requirement has not been met is that Plaintiff's proposed classes are so broad and indefinite that they encompass products that she herself did not purchase. . . .The putative classes Plaintiff seeks to certify . . . would also encompass a whole host of other products that Plaintiff has nothing to do with. . . . As such, the claims of the unnamed plaintiffs who purchased products Plaintiff herself did not buy are not 'fairly encompassed by [Plaintiff's claims.'

Id. at * 13 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). The Court's decision in *Major* is consistent with other cited decisions holding that the typicality requirement is not met where the named plaintiff "purchased a different product than that purchased by unnamed plaintiffs." *E.g., Wiener v. Dannon Co.*, 255 F.R.D. 658, 665 (C.D. Cal. 2009)(plaintiff-purchaser of Activia could not represent a class of purchasers of DanActive or Activia Light); *Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616, 622 (S.D. Cal. 2007) (plaintiff-purchaser of one variety of Pantene Pro V could not represent a class of purchasers of other varieties of Pantene Pro V).

This reasoning applies equally here. Although this case does not involve products purchased by Plaintiff, it does involve a newly formulated request by Plaintiff to represent a class of individuals who are not similarly situated with him and whose claims are not fairly encompassed by his claims. Just as the plaintiff in *Major* could not represent unnamed plaintiffs who purchased varieties of juice drinks that she did not purchase, Plaintiff here cannot represent a class of unnamed plaintiffs who received cellular calls with scripts that he did not receive. Plaintiff simply "has nothing to do with" those calls. *Major*, 2013 U.S. Dist. LEXIS 81394 at * 3. The question whether any individual cellular call script violated the TCPA would involve a unique analysis as to whether that particular call script was "informational" in nature or whether it was instead a "telemarketing" call. This is because under regulations recently enacted by the FCC, different methods of expressing "prior express consent" to be called, as used in 47 U.S.C. § 227(b)(1)(A), apply with respect to informational versus telemarketing calls. *See In re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 020278, FCC 12-21 at p. 12, ¶ 28.

None of the cases cited above by Plaintiff lend any support to Plaintiff's request for data on calls that he admits he never received. *Whitaker v. Bennett Law, PLLC*, No. 13-CV-3145-L NLS, 2014 WL 5454398 at *5 (S.D. Cal. Oct. 27, 2014) and *Bridgeview Health Care Ctr., Ltd. v. Clark*, No. 14-3728, 2016 WL 1085233, at *5 (7th Cir. Mar. 21, 2016) both involved classes of individuals who received ***precisely the same communication*** as did the named plaintiff. Likewise, although the named plaintiffs in *Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 821 (8th Cir. 2015) did not hear the entire prerecorded script because the calls they received went to an answering machine, the plaintiffs and all class members all received the ***same call.*** In contrast, here Plaintiff admits that he received only one of the "dozen" different call scripts that he contends were used by OneCommand, ranging in content from "Happy Anniversary" to "Thank you." Unlike in *Golan*, the defenses to a TCPA claim based upon any or all of these call types would be unique because the circumstances of each call must be analyzed to determine whether it was an "informational" or rather a "telemarketing" call. Plaintiff's attempt to characterize all of these calls as part of a uniform course of conduct directly contradicts this Court's holding in *Major* and the related cases cited by OneCommand.

Therefore, data and information related to people who did receive those other calls has no connection whatsoever with Plaintiff's alleged claims. The Court should deny his request for discovery of this irrelevant information.

Second, Plaintiff's request should be denied because Plaintiff has known, for many months, that OneCommand made other types of calls in addition to the Overdue Maintenance Reminder call that Plaintiff received, and that OneCommand did not produce data for those calls in response to Interrogatory No. 8 or RFP No. 4. In fact, Plaintiff had this knowledge before he submitted Discovery Dispute Joint Report 3 on August 20, 2015. (Dkt. No. 62). That Report concerned OneCommand's response to Plaintiff's Interrogatory No. 8, which was the mirror image of RFP No. 4 in that it requested the same data and information about the recipients of the calls. Yet, Plaintiff failed to raise at that time any issue with regard to the *types of calls* for which OneCommand had produced data. He only argued that OneCommand had not produced enough data with respect to the Overdue Maintenance Reminder call.

OneCommand could not have been more clear in its responses to Interrogatory No. 8 and RFP No. 4, which it served in June 2015. In its responses, OneCommand objected to producing information "that is beyond the scope of the class of similarly situated individuals who received the same call that Plaintiff claims to have received."[4] OneCommand further responded that it had produced documents containing "the unique telephone numbers whose owners are similarly situated with Plaintiff in that they received, on or after July 1, 2010, the same call on behalf of Normandin's that Plaintiff allegedly received in March 2014." Communications between counsel prior to the submission of Discovery Dispute Joint Report 3 made clear that Plaintiff's counsel understood precisely what call data had been produced and what call data had not been produced. Further, OneCommand expressly stated in Discovery Dispute Joint Report 3 that what it had produced was "a listing of the approximately 5800 unique cellular telephone numbers whose owners are similarly situated with Plaintiff in that they received, on or after July 1, 2010, the same call on behalf of Normandin's that Plaintiff allegedly received in March 2014." (Dkt. No. 62 at p. 6). Plaintiff could not reasonably have misunderstood OneCommand's response or believed that it had produced information related to calls other than the one that Plaintiff received.

[4] The Court quoted this precise language in its Order on Discovery Dispute Joint Report 3 (Dkt. No. 70).

Meanwhile, on June 9, 2015 (more than two months before Discovery Dispute Joint Report 3 was submitted), Normandin's produced in discovery a document (NOR-DEF002860.1-DEF002860.48) entitled "Details by Campaign Between 3/1/2014 and 3/31/2014." This document (which is the apparent source of Plaintiff's contention that OneCommand used "a dozen" call scripts on behalf of Normandin's) purports to list the names, dates, phone numbers, and other information for all calls made by OneCommand on behalf of Normandin's during the month of March 2014. It listed that information separately for each type of call made. Armed with this document, and with the clear statements by OneCommand in its June 2015 responses to Interrogatory No. 8 and RFP No. 4 and in Discovery Dispute Joint Report 3, it is incomprehensible for Plaintiff to suggest that he only recently learned that OneCommand had not produced data for call scripts other than the Overdue Maintenance Reminder Call.

Even if Plaintiff had a legitimate basis to request the additional call data that he now seeks, which he does not, that request should have been made prior to the submission of Discovery Dispute Joint Report 3 in August 2015, in keeping with the Court's standing orders on discovery disputes. Plaintiff did not do so, and he should now be precluded from further delaying his motion for class certification and from seeking to expand the scope of the class beyond the only one that Plaintiff can arguably represent consistent with Rule 23.

RESPECTFULLY SUBMITTED AND DATED this 28th day of March, 2016.

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CERTIFICATE OF SERVICE

I, Adrienne D. McEntee, hereby certify that on March 28, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 28th day of March, 2016.

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